IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

FRIDAY, THE 16TH NOVEMBER 2007 / 25TH KARTHIKA 1929

ST.Rev..No. 34 of 2004

TA.478/1998 of S.T.A.TRIBUNAL,ADDL.BENCH,KZD.
.....

PETITIONER/APPELLANT:

K.KUNHIMOIDEEN,
KADOOR ESSENTIAL OILS,
KADOOR,
MAYYIL.

BY ADV. SRI.JOSEPH MARKOSE
SRI.MITHUN MARKOS
SRI.K.B.MUHAMED KUTTY

RESPONDENT/RESPONDENT:

STATE OF KERALA,
REP. BY THE SECRETARY (TAXES),
TRIVANDRUM.

BY SR. GOVERNMENT PLEADER SRI. MUHAMMED RAFIQ.

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 16/11/2007, ALONG WITH STRV NO. 35 OF 2004 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L. DATTU, C.J. & K.M. JOSEPH, J.

S.T. Rev. Nos.34 and 35 of 2004

Dated this, the 16th day of November, 2007.

ORDER

H.L. DATTU, C.J.

The petitioner is a dealer in sandalwood oil. He has registered himself as a dealer both under the Kerala General Sales Tax Act ("KGST Act" for short) and the Central Sales Tax Act ("CST Act" for short). The petitioner is an assessee on the files of the Additional Sales Tax Officer, Taliparamba. In these Tax Revision Cases, we are concerned with the assessment year 1994-1995.

2. The petitioner had filed his annual returns before the assessing authority conceding a total turnover of Rs.6,42,000/- and taxable turnover as 'nil'. The said turnover, according to the assessee, represented deemed export sales of sandal wood oil exempt under Section 5(3) of the C.S.T.Act. The assessing authority after rejecting the returns filed, has completed the assessments vide his order dated 31.1.1998 and has assessed a total taxable turnover of Rs.26,66,510/- and has demanded balance tax and surcharge of Rs.4,60,855/- . While completing the best judgment assessment, the assessing officer, firstly has denied the exemption for deemed export sales on the ground that Form 'H' declaration produced by the assessee are defective; secondly, based on the inspection report, has made an addition of Rs.1,21,000/- as value of suppressed turnover and lastly, an amount of Rs.19,26,000/- was also estimated as unaccounted sales of 300 Kgs. of sandal wood oil in respect of consignment sales made through M/s.New Jaya

Enterprises.

3. The petitioner being aggrieved by the order of assessment passed by the assessing authority both under the KGST Act and CST Act had preferred appeals before the Appellate Assistant Commissioner. The appellate authority by its order dated 7.9.1998 had set aside both the orders passed by the assessing authority and had remanded the matter to the assessing authority for re-determination of the liability in the light of the observations made in the course of his order.

4. The assessee being aggrieved by the certain findings in the orders passed by the first appellate authority had filed second appeal before the Appellate Tribunal in T.A. 478 of 1998. While the second appeal was pending, the assessing officer had initiated proceedings for revising the assessment, pursuant to the directions issued by the first appellate authority in his order dated 7.9.1998 and has completed the same by re-determining the taxable turnover in a sum of Rs.30,18,060/- by his order dated 12.2.1999. Against the said order, the assessee had preferred first appeal before the Appellate Assistant Commissioner, who by his order dated 29.6.1999 has allowed the appeal and once again remanded the matter to the assessing authority with a direction to pass a fresh order in accordance with law.

5. The State being aggrieved by the remand order passed by the first appellate authority filed second appeal before the Tribunal in T.A. 259 of 1999. The Tribunal has clubbed both the appeals filed by the assessee and the State Government and has passed common order dated 20.3.2003, dismissing the appeal filed by the assessee and allowing the appeal filed by the State Government.

6. The petitioner being aggrieved by the common order passed

by the Tribunal is before us in these Tax Revision Cases.

7. The assessee has framed the following questions of law for our consideration and decision. They are:-

> "1) Whether on the facts and in the circumstances of the case there was any evidence or material on record for the Appellate Tribunal to confirm the assessment of the estimated turnover in respect of 300 Kgs. of Sandalwood Oil?
>
> 2) Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that an amount of Rs.19,26,000/- is liable to be assessed in the hands of the petitioner during the relevant assessment year as sales turnover of unaccounted sale of 300 kgs of Sandalwood Oil?
>
> 3) Whether on the facts and in the circumstances of the case there was any material or evidence before the Appellate Tribunal to hold that an amount of Rs.1,21,020/- is to be assessed in the hands of the petitioner as value of suppression detected during the year and an equal amount of Rs.1,20,020/- as additional suppressed turnover?
>
> 4) Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in holding that Annexure C order is only a remand with specific directions and accordingly the AAC had exceeded his jurisdiction in Annexure G order in considering the grounds relating to addition of suppressed and estimated turnover?
>
> 5) Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in setting aside the findings of the Appellate Commissioner with respect to the additions of suppressed turnover and estimation sales turnover of 300 Kgs. of Sandalwood Oil in Annexure G order?
>
> 6) Whether on the facts and in the circumstances of the case and in the light of the finding of the AAC that Form 18A was produced by the petitioner for claiming exemption in respect of the deemed export sale of sandalwood oil of Rs.6,42,000/- the finding of the Appellate Tribunal that the petitioner has not produced the original of Form 18A is supported by any material or evidence on record?
>
> 7) Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in holding that the petitioner is not entitled to exemption in respect of the deemed export sale of sandalwood oil of Rs.6,42,000/-?"

8. During the assessment year 1994-1995, the assessee had filed his annual returns. The assessing authority before rejecting the returns so filed, had issued a pre-assessment notice dated 3.12.1997. Apart

from pointing out various irregularities in the return filed, in so far as the sale of sandalwood oil is concerned, had stated at paragraph 3 as under:

> "III. An amount of Rs.10,86,720.00 is shown in the name of M/s.New Jaya Enterprises, Calicut as sundry credition account. No explanation is offered in respect of the above. Enquiry reveals that there is a stock of 300 kgs. of sandalwood oil handed over for sale. But that 300 kgs. sandalwood oil has not seen as closing stock in the trading accounts. This is mysterious. I had gone through the return filed by the dealer from 1.4.'93 to 31.10.'97. There was no sales effects in this consignment. From this it is clear that the dealer sold the goods as unaccounted. Hence this 300 kgs. sandalwood oil attracts sales tax. The sale value is estimated adopting the rate of Rs.6,42,000/- for 100 kgs. as is revealed from the accounts for the year 1994-95."

9. The proposal so made was replied by the assessee by his reply dated 2.1.1998. In so far as the aforesaid proposal, the assessee at paragraph 9 of his reply had stated as under:

> "9. As per proforma invoice No.1 dt.12.10.91 and under cover of Delivery Note No.119111 dt. 12.1.91, 300 kgs. of sandalwood oil was entrusted to M/s. Jaya Enterprises, Calicut for commission sale. The approximate value thereof was Rs.10,86,720.00 including excise duty. The stock was sold during the year 1994-95, but pattial was obtained in 1995-96. The copy of the invoice No.1 dt.5.9.94 for Rs.15,92,064/- is produced, S.T. of Rs.2,65,344/- has been remitted by the Commission agent with the S.T.O. Calicut (R.C.No.33112205). Hence, no taxation at our hands is necessary. The same was shown as stock at Calicut in our stock statements since sale pattial was received subsequently. There is nothing untoward in the matter since the accounts reflect this picture correctly. This stock has not been sold and therefore the same cannot be treated as sold during the

year and the value thereof cannot be estimated. The same proposal may kindly be deleted.".

10. The assessing authority after rejecting the books of accounts and the returns filed by the assessee has proceeded to bring to tax the sale of 300 Kgs. of sandalwood oil in the hands of the assessee, on the ground, that the assessee had not produced fresh materials to demonstrate that his consignment agent had not only effected sale of 300 kgs. of sandalwood oil, but also had paid tax on the said sale. The findings and the conclusions reached by the assessing authority on the aforesaid issue is as under:

"The goods was sold on 5.9.1994 by M/s.New Jaya Enterprises, Calicut but as per the books of accounts and trading account 300 kgs. of sandalwood oil was shown as a closing stock at M/s.New Jaya Enterprises Calicut. As per the return filed bill No.97 the dealer had not conceded the sale. Therefore, the sales of 300 kgs of sandalwood oil is suspicious. Further the dealer produced a letter from M/s.Floral Aromatics, Calicut stated that they had paid, sales tax Rs.265344.00 in this consignment sales. M/s.New Jaya Enterprises, Calicut is the consignee in this case, not M/s.Flora Aromatic, Calicut. My further enquiry reveals that M/s.New Jaya Enterprises had not produced the books of accounts and other details in the concerned sales tax office, which is 1st Circle, Kozhikode. This is evidence that the dealer failed to prove the consignment sales actually effected.".

11. Aggrieved by the order so passed by the assessing authority, the assessee had carried the matter in appeal before the Appellate Assistant Commissioner, Commercial Taxes, Kannur in S.T.A. Nos.332 of

1998 and 333 of 1998. The First Appellate Authority, by its order dated 30.3.1998 has allowed the assessee's appeal in part and has further directed the assessee to produce Form 18A declaration to prove his claim for exemption. The order passed by the First Appellate Authority in this regard is as under:

> "In respect of C.S.T. assessment the appellant has supplied sandal wood oil to a Calicut dealer and the same was exported by air as such no bill of lading available. The appellant is ready to submit Form 18A declaration to prove his claim of exemption. The assessing authority shall return the Form H declaration to the appellant and grant one more opportunity to the appellant for production of Form 18A declaration. The concessional rate of tax to the S.S.I. Unit shall be granted subject to eligibility after verification of the required documents.".

12. The First Appellate Authority has not adverted to the grounds raised by the assessee in regard to the quantification of the tax liability by the assessing authority on the sale of 300 kgs of sandalwood oil.

13. The assessee being aggrieved of the order passed by the First Appellate Authority, which would affect his interest, and the revenue being aggrieved by the direction issued by the First Appellate Authority in permitting the appellant to produce Form 18A declaration to claim certain exemptions, had filed appeals before the Sales Tax Appellate Tribunal in T.A. 478 of 1998 and 259 of 1999 respectively. In so far as the quantification of tax liability by the assessing authority in the hands of the assessee, ignoring the claim of the assessee that the said sale was made by the consignment agent,

the Tribunal in its lengthy and well considered order at paragraphs 12 to 16 observed as under:

> "12. Regarding the turnover of Rs.15,92,064/-, the specific contention of the assessee is that, 300 kgs; of sandalwood oil was entrusted to M/s. Jaya Enterprises, Calicut, for commission sale as per Inv., dt. 12.10.1991, and under cover of delivery note of the same date. The approximate value including excise duty was Rs.10,86,720/-. Even though the stock was sold during 94-95, the patial was obtained in 95-96.
>
> 13. Here, it is pertinent to point out that, as rightly pointed out by the assessing authority, page 53 of the asst., file is the Schedule A i.e., Schedule to Sundry Creditors as on 31.3.1995. Entry No.2 is M/s. New Jaya Enterprises, Calicut, and the amount noted is Rs.10,86,720/-. If as contended by the assessee, 300 kgs of sandalwood oil was entrusted to M/s. Jaya Enterprises, Calicut, as per Inv. dt. 12.10.91, there is no valid explanation forthcoming from the side of the assessee as to why an amount of Rs,10,86,720/-, which itself, according to the assessee, an approximate figure was shown in the Schedule to the Sundry Creditors as on 31.3.95.
>
> 14. The fact that, a valuable item such as sandalwood oil of such a huge quantity was kept for such a long period, ie., since 1991 till 1994, in which year even according to the assessee, sale of said item was effected could not also be believed. Further, the assessee has not cared to produce a true copy of the Invoice dt.12.10.91, as per which, this item was said to have been entrusted with M/s.Jaya Enterprises, Calicut.
>
> 15. Moreover, on a perusal of the photostat copies of the document produced from the side of the appellant, we doubt the genuineness of the same. It is revealed from the photostat copy of the consignment sale account dt. 2.1.95, in the name of New Jaya Enterprises, Calicut, that, there is a mention about receipt of 300 kgs; of oil as per Inv.No.1 dt. 5.9.94. There is a mention

about payment of Rs.19,232/- by way of tax, which cannot be accepted. Another vital aspect to be taken note of is that, a sum of Rs. 1,08,000/- is noted as expenses by way of postage, telegram, telephone etc., which is hardly believable. Above all, a sum of Rs.24,000/- is noted as Agents Commission, and another sum of Rs.48,000/- as commission of Jaya Enterprises, who themselves are commission agents. All these aspects indicate that, those amounts were arranged in such a way so as to arrive at the figure of Rs.15,92,064/- i.e., the alleged sale value according to the appellant including excise duty. Hence, those document cannot be treated as valid document, and hence, no reliance can be attached to the same.

16. Considering all the above aspects of the matter, we find that, the assessing authority was justified in estimating the sale value of said 300 kgs of sandalwood oil. So, we hereby confirm the same."

14. Having noticed the facts and the orders passed by the authorities under the Act, now we will consider the legal issues raised by the assessee. In so far as question Nos. 1, 2 and 5 are concerned, they relate to the issue with regard to the sale of 300 kgs of sandalwood oil, which is quantified in the hands of the assessee. In so far as issue No.3 is concerned, it relate to the orders passed by the Tribunal holding that an amount of Rs.1,21,020/- requires to be assessed in the hands of the assessee. In so far as issue No.4 is concerned, in our opinion, the said issue cannot be construed as a question of law and it is purely a question of fact. Therefore, that question need not be taken note of by us.

15. In so far as question Nos. 6 and 7 are concerned, the Tribunal has rejected the claim of the assessee on the ground that the assessee failed to produce the original of Form 18A declaration and therefore

the First Appellate Authority was not justified in allowing the claim made by the assessee for grant of exemption in respect of deemed export sale.

16. We will take up issue Nos. 3, 4, 6 and 7 first for our consideration and decision.

17. Issue No.3 pertains to the orders passed by the Appellate Tribunal holding that an amount of Rs.1,21,020/- requires to be assessed in the hands of the petitioner as value of suppression detected during the assessment year 1994-1995.

18. During the assessment year 1994-95 there was a shop inspection conducted by the Intelligence Wing of the Department and it noticed certain suppression in the books of accounts maintained by the dealer. The same had been brought to the notice of the assessee by the Intelligence Wing of the Department, which had conducted the inspection. The assessee had accepted the suppression so detected and had compounded the offence departmentally.

19. The assessing authority while concluding the assessment for the year 1994-95 had made an addition of twice the amount of suppression detected in view of the fact that the assessee had compounded the offence departmentally. The order so passed in this regard by the assessing authority was modified by the first appellate authority by reducing the suppression detected in a sum of Rs.1,21,020/-. The order so made by the First Appellate Authority in this regard is also confirmed by the Tribunal.

20. Sri. Joseph Markose, learned counsel appearing for the assessee would submit that the suppression that was detected by the Intelligence Wing of the Department was only a sum of Rs.9,226/-_ and therefore there was no reason for the assessing authority to have made an

estimation of the suppressed turnover in a sum of Rs.1,21,020/-.

21. In our view, this submission of the learned counsel has no merit whatsoever. Inspection was done by the Intelligence Wing of the Department in the business premises of the assessee on 16.11.1994. On such inspection, it was found that the assessee had written the day book only upto 31.10.1994 and there was stock difference also. From this circumstance, it is open to the assessing authority to infer that the assessee had dealings outside his accounts. In such a situation, it is not possible to the assessing officer to find out precisely the turnover suppressed. He could only make an estimate of the suppressed turnover. So long as the estimate made by him is not arbitrary and has nexus with the facts discovered, the same cannot be interfered with. Secondly, when the irregularities were pointed out in the books of accounts maintained by the dealer, the dealer has compounded the offence departmentally and therefore at this point of time, the assessee cannot contend that there was no justification for the First Appellate Authority and the Tribunal to hold that an amount of Rs.1,21,020/- requires to be assessed in the hands of the assessee. In view of this, question No.3 framed by the assessee requires to be answered against the assessee and in favour of the revenue.

22. In so far as issue No.4 is concerned, the said question, in our opinion, cannot be construed as a question of law. The revisional jurisdiction of this court is very much limited. This court can examine a question, if the Tribunal has either decided erroneously or has failed to decide any question of law. Since we are of the opinion that issue No.4 is mainly a question of fact, the consideration of that question in these Tax Revision Cases would not arise. Therefore, question No.4 raised by the assessee requires to be answered against the assessee and in favour of the revenue.

23. In so far as issue Nos.6 and 7 are concerned, the assessee had claimed exemption in respect of certain turnovers on the ground that they are export sales. However, before the assessing authority the assessee has produced only Form No.H in support of the claim so made. The assessing authority had rightly rejected the claim on the ground that the assessee has not produced the declaration forms as prescribed under the KGST Act.

24. Before the First Appellate Authority the assessee had produced xerox copy of the air way bill and Form No.18A declaration. The appellate authority was convinced about the claim made by the assessee and therefore had directed the assessee to produce Form 18A declaration to prove his claim for exemption on the export sale before the assessing authority and had further directed the assessing authority to return Form H declaration to the assessee.

25. Before the Tribunal, the assessee could not produce the original Form No.18A, that was in his possession. The Tribunal is of the opinion that the assessee had produced only photostat copies of Form 18A declaration and therefore the assessee is not entitled to the claim for exemption on the export sales.

26. Sri. Joseph Markos, learned counsel appearing for the assessee has produced before us the original Form 18A declarations. Having gone through those declarations, we are satisfied that the First Appellate Authority had looked into the original 18A declaration form, that was produced before him, and therefore, had directed the assessing authority to look into original Form 18A declaration and grant exemption claimed by the assessee on the export sales.

27. Learned counsel appearing for the revenue, Sri. Muhammed

Rafiq has also gone through the original of 18A declaration form. He is also satisfied that the assessee is in possession of Form 18A declaration form and the same can be produced before the assessing authority to prove his claim for exemption in so far as the turnover on the export sales. In that view of the matter, that portion of the order passed by the Tribunal requires to be set aside and question Nos. 6 and 7 framed by the assessee requires to be answered in favour of the assessee and against the revenue.

28. Now we come to issue Nos. 1, 2 and 5. These issues are interconnected and, therefore, they are taken up together for consideration and decision.

29. The assessee is a dealer in sandalwood oil. The assessee has consignment agent in Calicut. According to the assessee, he had effected consignment transfer of 300 kgs of sandalwood oil to his agent sometime in the month of October, 1991. The same was reflected in the books of accounts maintained by the assessee as the stock in the hands of his Calicut agent. The same was continued to be shown in the books of accounts maintained for the subsequent years also.

30. For the first time in the year 1994 -1995, the assessing authority noticing certain discrepancies in the books of accounts maintained by the dealer, in so far as the sale of 300 kgs of sandalwood oil is concerned, had issued a pre-assessement notice, in which it was brought to the notice of the assessee that the sale of 300 kgs of sandalwood oil has not been reflected in the turnovers filed before the assessing authority.

31. The assessee, in his reply has stated that his consignment agent at Calicut had effected sales of 300 kgs of sandalwood oil that was transferred to him by way of consignment transfer in the year 1991, and the

same was sold during the year 1994-1995 and he has paid tax on the said sales. In support of the claim so made, the assessee had produced the photostat copies of the invoice and a certificate issued by the purchasing dealer, who is said to have purchased 300 kgs of sandalwood oil through the consignment agent. The assessing authority was not satisfied with the explanation offered by the assessee. Therefore, after making further verification of the books of accounts and other details of the consignment agent with the concerned sales tax office, has come to the conclusion that the assessee has failed to prove the consignment sales effected by the assessee's agent at Calicut.

32. It was the stand of the assessee that it was his consignment agent, who had effected sales of 300 kgs of sandalwood oil and had paid tax on the said sales. The assessing authority is of the opinion that if the sales were actually effected by the assessee's consignment agent, the assessee could have produced orders of assessment passed by the assessing authority against his consignment agent. In our view, this would have been the best piece of evidence to prove that it is his agent, who had effected sale of 300 kgs of sandalwood oil, that was transferred to the consignment agent.

33. The assessee along with the revision petition has produced copy of the consignment sales account of his agent, namely, M/s. New Jaya Enterprises, Calicut. In the said sales account there is an indication that his agent had received 300 kgs of sandalwood oil under invoice dated 5.9.1994. The document so produced by the assessee himself would belie the theory that the assessee's agent had effected sales of 300 kgs of sandalwood oil that was consigned to him sometime in the month of October, 1991. Keeping all these aspects in view, the Tribunal has rightly come to the conclusion that the

assessing authority was justified in bringing to tax the sale of 300 kgs of sandalwood oil in the hands of the assessee by ignoring the claim of the assessee that the said sales were made by his consignment agent. In that view of the matter, issue Nos.1, 2 and 5 requires to be answered against the assessee and in favour of the revenue.

34. Accordingly the Tax Revision Cases are allowed in part and issue Nos.1, 2 and 5 are answered against the assessee and in favour of the revenue. Issue Nos. 6 and 7 are answered against the revenue and in favour of the assessee. Issue No.3 is answered in favour of the revenue and against the assessee and issue No.4 is left unanswered.

35. Consequently I.A. 283 of 2004 in S.T.Rev. 34 of 2004 and I.A. 301 of 2004 in S.T.Rev. 35 of 2004 are dismissed.

Ordered accordingly.

H.L. DATTU,
CHIEF JUSTICE

K.M. JOSEPH,
JUDGE

sb/DK.